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IS "INTANGIBLE" PERSONAL PROPERTY OWNED BY ESTATES OF NON-RESIDENT DECE- DENTS LIABLE TO TAXATION IN PENNSYLVANIA?

Taxation, defined as a "system of forced contribution to meet the expenses of the government, whether national or local," (Hadley, *Economics* 449) with its important and various divisions and propositions, *e. g.*, of subjects and objects, of fairness, of popular endurance, of net results, and largely of "appropriations," is an interesting study, not only to practical politicians, but to philosophical minds—and even to the taxpayer. To the lawyer in active practice the questions arising under these laws are not those of governmental theories or of political economy. He is usually concerned to resist a specific claim made against a particular client or a number of clients whose interests are the same. The constitutionality of an Act of Congress may be attacked, for example the late Income Tax, the Succession Law of 1898, or a State statute, as the Direct Inheritance Tax of 1897 in Pennsylvania. Frequently, however, counsel try to show that the legislation failed to cover the case under discussion; that its particular facts are not within the language of the law.

Such an attempt has failed in New York and the "Transfer Tax Act" [L. 1892 c. 399] (an inheritance taxation) was held to cover bonds and stocks belonging to non-residents and deposited within the State for safe-keeping, and also extended to bank deposits there payable to non-residents (*Matter of Bronson*, 150 N. Y. 1; *Matter of Whiting*, 150 N. Y. 27; *Matter of Houdayer*, 150 N. Y. 37).

This abrogates by statute, and the judicial construction thereof, the old and well settled doctrine of the location of these particular kinds of personal property, (expressed in the maxim "*mobilia personam sequuntur*,") and a glance at these New York cases naturally suggests an inquiry into the law of Pennsylvania. As the point involved turns upon the non-residence of the owner, we may also consider the case of a

non-resident trustee of an estate as hereinafter set forth. It is true that in theory no form of tax is more easily borne than a succession tax. One who gets his plum without even the trouble of going into a corner to put in his thumb ought readily to hand over a small slice for the common good, and the more remote his kinship to the maker of the pie, or in case of no relationship at all, the more cheerfully should he enlarge the piece; but this mental acquiescence is rare. It is not, however, with the subjective aspect of the matter, nor yet with the objective advantages based upon the facility of discovery and collection by means of inventory and appraisement, accounting and the vigilance of courts of probate, or even with the averred unfairness of double taxation, (at the domicile and also in another State) that the present paper is concerned. The purpose is to consider two questions which seem related to each other by the common point of non-residence. They may be thus stated, to wit:

1. Where a person, not residing in Pennsylvania, dies leaving securities of the kind described (*i. e.*, choses in action, or deposits of money), which he has lodged in Pennsylvania for safe-keeping, is any inheritance tax upon these securities or their transfer payable in Pennsylvania?

2. Where a Trustee or Executor, who is not a resident of Pennsylvania, deposits in that State for safe-keeping such securities of the estate of a person who was also not a resident of Pennsylvania, does the Trustee or the Trust Estate become liable for annual city taxes in Philadelphia, or State taxes to Pennsylvania?¹

It is believed that both questions should be answered in the negative; that is, in neither case, as stated, is there any liability to taxation in Pennsylvania under existing legislation.

¹These were recently put to the writer, and they suggested the study whose results are here given. This article treats solely of the law in Pennsylvania. For the statute in Massachusetts and its construction, see *Callahan v. Woodbridge*, 171 Mass. 595, and cases therein cited, and generally as to the place of taxation of personal property examination of the recent case, *New Orleans v. Stemple*, 20 S. C. Rep. 110, (with *People ex rel. Jefferson v. Smith*, 88 N. Y., 576, and *Estate of Jefferson*, 35 Minn. 215), is suggested. For this last citation, the writer is indebted to Judge Jaggard, of St. Paul, Minn.

The first thought is that the mere bailment, or deposit of securities, without any other evidence of change of ownership, legal or equitable, does not alter their status. They belong to the estate of the decedent in the one case or to the trust estate in the other without regard to the place of custody.

An analogy may be found in the facts reported in *Shakespeare v. Fidelity Trust Co.*, 97 Pa. St. 173. J. B. Ackley, who was domiciled in New Jersey at the time of his death in September, 1874, had deposited on August 6, 1873, and at other times, with the Fidelity Insurance Trust and Safe Deposit Company of Philadelphia, U. S. 5-20 bonds of the face value of \$17,400 and received therefor a certificate of deposit. He left a will upon which letters testamentary were duly granted by the surrogate of Burlington County, N. J., to Ransom Rogers, the executor therein named. The certificates were presented by Rogers to the Trust Company and the bonds were delivered by it to him. Subsequently letters of administration d. b. n. c. t. a. were granted in Philadelphia to James Shakespeare, who sued the Trust Company for the bonds—the action being trover and conversion. The verdict was for the plaintiff, but the court entered judgment for the defendant on the point reserved, to wit, that the plaintiff was not entitled to recover upon the facts found. On error the Supreme Court affirmed the judgment. Sharswood, J., said: "There is another point, which, we think, disposes of the question upon this record. We do not consider that the United States coupon bonds, which are the subjects of this controversy, were at the time of the death of the decedent any part of his estate in this Commonwealth. The defendants were the mere depositaries of the bonds for safe-keeping. They were therefore in the possession of the decedent. He held the certificates of their deposit. The defendants were bound to restore the bonds at any time. It was as if the bonds had been placed in a fire-proof of the defendants, of which the decedent possessed the key. In point of fact the certificate was in the actual possession of the widow of the decedent in New Jersey. She surrendered it as she was bound to do to the foreign executor. She could not have withheld it. The New Jersey executor could have sued her, and compelled its delivery to him. The Pennsylvania administrator certainly could not."

It is a duty, however, to examine the statutes relating to taxation. There are, it may be said, in a general way, three lines of taxation in this State. The Collateral Inheritance Tax is one. The taxation of personal property for State purposes is another. The third is the taxation of real estate for municipal purposes, the rate being annually fixed by City Councils, and this is not pertinent to our inquiry.

As a matter of interest it may be noted that there was an effort to establish a system of Direct Inheritance taxation by an Act of May 12, 1897, P. L. 56, but the statute has been declared unconstitutional: Cope's Estate, 191 Pa. 1, and following cases, *id.*

The present statute which applies to the first question is that of May 6, 1887, P. L. 79, entitled "An act to provide for the better collection of collateral inheritance tax." It is, in part, as follows: "All estates, real, personal and mixed, of every kind whatsoever, *situated* within this state, whether the person or persons dying seised *thereof be domiciled within or out of this state*, and all such estates situated in another state, territory or county, when the person or persons dying seised thereof, shall have their domicile within this commonwealth, passing from any person to any person or persons other than to or for the use of father, mother, husband, wife, children and lineal descendants born in lawful wedlock, or the wife or widow of the son of the person dying seised or possessed thereof, shall be made subject to a tax of five dollars on every hundred of the clear value of such estate or estates." Prior statutes of this State, which are codified in this act, are referred to and compared in a very careful and able opinion by Judge Penrose, of the Orphans' Court of the County of Philadelphia: *Del Busto's Estate*, 23 Weekly Notes of Cases 111. He shows that the section of the existing act, just recited, did not introduce a new subject of taxation. Therefore, decisions of the Supreme Court interpreting and applying those statutes are authoritative in considering questions under the Act of May 6, 1887, the last legislation upon the subject. The principle of the decisions is the familiar one that the situs of personal property follows the domicile of the owner: *Orcutt's Appeal*, 97 Pa. 179. See

McKeen v. Northampton, 49 Pa. 519, opinion of Agnew, J., p. 530.

A striking case is that of the Appeal of the Commonwealth of Pennsylvania, 11 Weekly Notes of Cases 492. A decedent had been in her lifetime a resident of Cuba. Her will was admitted to probate in Cuba, but ancillary letters were taken out in Pennsylvania. By her will her estate was divided among collaterals. The assets consisted of various municipal, government and corporation bonds, all American in issue, amounting to a large sum. Held, upon the adjudication of the account of the administrator in Pennsylvania, that these securities were not liable to the collateral inheritance tax. The Commonwealth appealed to the Supreme Court. In a *per curiam* opinion the court held that the Act of April 10, 1849, which we have seen to be substantially the same as the present Act of 1887, and which provided that if any person or persons having their domicile in another State, territory or country "shall die leaving real or personal estate within this commonwealth, the said estate, whether real or personal, shall be subject to the payment of the collateral inheritance tax," was intended to embrace only personal property of a tangible nature, and not mere evidences of indebtedness which have no situs, but follow the owner's domicile.

Hawkins, P. J., of the Orphans' Court of Allegheny County, stated the law and distinguished it in regard to the special property which was the subject of the claim for tax in the case before him: *Coleman's Estate*, 159 Pa. 231. He said: "The solution of the question involved in this case turns mainly upon the application of the maxim that the situs of personal property follows the domicile of the owner. It was said in *Small's Estate*, 151, Pa. 1, that as a general rule intangible personal property of a non-resident, such as bonds, mortgages and other choses in action, is governed, as to its situs, by the fiction of law above noticed, and hence such property is not subject to collateral inheritance taxation under the Act of 1887, because not situated in this State. Some species of personal property, it is true, when used in carrying on business or for other particular purposes, may have an actual as distinct from a legal situs; but the local character of

the use takes it out of the operation of the rule. And of this Small's Estate is of itself a striking illustration. Not only was the 'thing' given employed in a business which was by its nature localized, but the manifest intent of the testator was that it should remain in this State. The bequest was specifically of testator's interest, including 'all the property real and personal, notes, stocks, bonds and accounts,' in a limited partnership organized under the laws, and having its principal place of business in this State. The value of the property depended largely upon its continuance here. There was no reason for its conversion and transmission to the testator's domicile, and it was given to the surviving partner as such in specie. The facts plainly made an exception to the general rule. The actual situs was here, and liability to the tax followed. It is urged upon behalf of the Commonwealth that this case rules the present; but the facts differ in material respects. The gift here was of an interest in a fund whose distribution belonged to the domicile of the donor."

Orcutt's Appeal is approved in Lines' Estate, 155 Pa. 393. The language of the statute seems clear. As was said by Judge Penrose in Del Busto's Appeal, *supra*, the principle that choses in action have no situs in the State ". . . has been incorporated in the new statute by express enactment; and the only property, real or personal, of non-residents now subject to the tax, is, in terms, declared to be that which has a 'situs' or is 'situated' in the State, thus excluding, under the familiar maxim, that which is not so situated. Nothing could be more significant of the legislative intent to adopt the doctrine of Commonwealth's Appeal (the justice and sound policy of which have never been questioned), than this substitution of a word implying tranquillity and locality instead of the loose and more comprehensive expression 'being in,' used in the prior acts."

It is to be observed that in the Del Busto Case the estate consisted of stocks and bonds of companies incorporated under the laws of Pennsylvania and doing business therein, and of cash awarded to the accountant by the Orphans' Court of Philadelphia. No distinction can be found in the opinion of Judge Penrose between the bonds and the other assets. Rep-

resenting the court in banc, he considered the question of the collateral inheritance tax with much care, and sustained the exceptions to the adjudication which he had made himself (*pro forma*) when sitting as auditing judge.

Now turning to the second question, it may be considered as the following inquiry: If a person must have a domicile in a State in order to be taxed by it, and if intangible choses in action follow the situs of their owner, is there any statute in Pennsylvania which imposes a tax on securities whose paper evidence (*e. g.*, bonds, certificates of stock, mortgages, etc.) are here simply on deposit, the legal and beneficial owners being residents of another State? Our contention is not now against the validity of such an enactment, if it have been made, but it is that no such law exists.

The Act of Assembly of June 8, 1891, P. L. 229, must be examined. By its title and preambles and in its terms it is a supplement to an act entitled "An Act to provide revenue by taxation," approved June 7, 1879, and the Act of June 1, 1889, and amends the same. It provides a system of taxation for State purposes and is comprehensive in its provisions. A number of sections relate to corporations, joint-stock associations and limited partnerships, specifying the reports to be made to the Auditor-General, the appraisement, the rate of the tax, the settlement, etc., etc., which do not bear upon our inquiry. The first section is in these words, in part: "Be it enacted, etc., That from and after the passage of this Act, all personal property of the classes hereinafter enumerated, owned, held or possessed by any person, persons, co-partnership or unincorporated association or company, resident, located or liable to taxation within this Commonwealth or by any joint-stock association . . . whether such personal property be owned, held or possessed by such person or persons . . . in his, her, their or its own right, or as active trustee, agent, attorney-in-fact or in any other capacity, for the use, benefit or advantage of any other person, persons, . . . is hereby made taxable annually for State purposes at the rate of four mills on each dollar. . . ."

The subjects of taxation are "all moneys owing by insolvent debtors, whether by promissory note, or penal or single

bill, bond or judgment, all articles of agreement and accounts bearing interest; all public loans, whatsoever, except those issued by this Commonwealth or the United States; all loans issued by or shares of stock in any bank, corporation, association, company or limited partnership, created or formed under the laws of this Commonwealth or the United States or of any other State or government. . . ."

The pertinent words are ". . . held or possessed by any person or persons, co-partnership or unincorporated association or company . . ." (a) "*resident*," (b) "*located*," (c) "*or liable to taxation within this Commonwealth*." The terms of our second question exclude (a) and (b), and the rulings heretofore cited place (c) on the basis of the other two descriptions, *i. e.*, liable at the time of the passage of the Act. No *new definitive liability is set out* in this section. If it be necessary to express the meaning of (c), it may be interpreted to refer to taxables *ejusdem generis* with those "resident" or "located;" or, since subsequent sections apply to corporations organized under the laws of other States or territories, but doing business or having capital or property employed or used in this Commonwealth (see Section 5), it may embrace that class of taxables. An expression of such indefinite breadth as "liable to taxation within this Commonwealth," should not be construed to *create a novel liability*. The care with which property held *in trust* by residents for non-residents is specified to be taxable, supports the proposition that there was no intention to tax securities whose owners (*trustees* or *cestuis que trustent*) are domiciled outside of Pennsylvania, who have within her borders neither "local habitation nor name."

Two authorities, though they may be distinguished from the facts of our present discussion, afford help in examining the Act of 1891. *Lewis v. County of Chester*, 60 Pa. 325, was under the Act of 1846, under which property held by a resident trustee for non-resident *cestuis que trustent* was liable to State tax. A testator domiciled in New York appointed his wife executrix and trustee of property which was situated in New York. She filed her account as executrix in the office of the Surrogate, which was allowed and confirmed and the order

made that she keep the balance invested and retain the same *in trust*, etc. The trustee was domiciled in Pennsylvania and her children, the *cestuis que trustent*, lived with her, and for seven years in the borough of West Chester, in this State. The assets in her hands consisted of United States bonds, Pennsylvania State stock, Philadelphia bonds, and bonds and mortgages, viz., \$17,500 in mortgages in Delaware and Maryland, and \$4,800 in mortgages in Pennsylvania. She was held liable for tax in Pennsylvania only on the amount invested in mortgages in this State. The ground for this limited liability was that she held these particular investments "by a personal contract protected solely by our law."¹ As to the bonds and stock, she was a trustee "under the law of New York and amenable only to the authority of that State. The Act of 1846 does not extend to such a case, but must be confined to the property she has here, and *has subjected to our law by investing it here*:" Agnew, J.

The other case is *Guthrie v. Railway*, 158 Pa. 433 (decided in 1893, under the Act of June 8, 1891). The facts are fully stated by McClung, J., in the lower court (p. 437), but the syllabus sufficiently presents them. A resident of the District of Columbia appointed by will as trustee of his estate a citizen and resident of Pennsylvania, who kept the securities of the estate in the city of Washington. The main beneficiary of the trust was the widow, a resident of Washington, to whom was given an annuity. All the other beneficiaries were residents of Pennsylvania or were presumed to live in this State. Among the assets of the estate were bonds, the interest on which was payable at the office of a Pennsylvania corporation.

¹ But see opinion of Mr. Justice Field in *Foreign Held Bonds Case*, 15 Wallace. On p. 323, . . . "A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein, but when held by a non-resident it is as much beyond the jurisdiction of the State as the person of the owner."—Note preceding pages 321-322. Here again, one may turn to another decision, *New Orleans v. Stemple*, 20 S. C. Rep. 110.

These were held liable to taxation in this State. The judge, whose opinion was affirmed by the Supreme Court in a "*per Curiam*," said: "In the present case we have a trust created by the act of the testator, a citizen of Pennsylvania appointed trustee by him, and all that the court of the District of Columbia did was to distribute the property to the party whom the testator appointed to receive it. Thus this testator must be regarded as having voluntarily *given it a situs* for the purpose of taxation within the State of Pennsylvania. It is a trust *recognized by our laws, entitled to and receiving their protection.*"

The necessity for a clearly expressed intent to tax may be illustrated by the case of mortgages held by corporations, which were taxable under the Act of 1844, P. L. 486, and the Act of 1846, P. L. 486; but it was decided in 1887, in Loughlin's Appeal, 19 Weekly Notes of Cases 517, that it was exceedingly doubtful whether these acts were in force, or repealed by the Act of June 7, 1879, P. L. 112, June 10, 1881, P. L. 99, and June 30, 1885, P. L. 193, as these last named acts did not, nor did any of them, impose taxes for State purposes upon mortgages owned by corporations. This immensely valuable class of securities so held escaped taxation. It will be observed that the Act of 1891 fully covers such property. The *per Curiam* opinion in Loughlin's Appeal contains a sentence so apposite and sound that it should be quoted (p. 519): "We do not think it is the proper function of the judiciary department of the government to impose taxation, which is a species of confiscation by a strained construction of doubtful legislation. . . ."

The conclusion is that personal property, other than what is known as "tangible," which belonged in his lifetime, to one not a resident of Pennsylvania, possessed by him at the time of his death, is not subject to the Collateral Inheritance Tax of the Commonwealth, even though the certificates or other evidences of the choses in action owned by the decedent's estate are deposited within the State. Further, if such securities (or deposits of money) are retained or placed here by a non-resident executor or trustee, there is not a liability to taxation for State purposes in Pennsylvania.

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